

# #DeniedMyVote too: Brits in France, the European Elections and the Council of State

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European Elections Day in the United Kingdom has been stained by [revelations](#) that many EU citizens were unable to vote due to various clerical errors, widely reported on Twitter with the hashtag [#DeniedMyVote](#). It seems that something along the same lines, though on a smaller scale, happened to UK citizens residing in other Member States of the European Union, for example in France.

For lawyers and legal scholars, Brexit is a gift that keeps on giving. Russian Dolls of legal conundrums. The [European Council decision of 11 April 2019, taken in agreement with the United Kingdom](#), to postpone Brexit until the 31<sup>st</sup> October (“Halloween Brexit”) offers a whole new world of legal delicacies since it compels the United Kingdom to organise European elections.

This prospect raises various political issues. Does it make sense for the British to take part in this important moment in the democratic life of the European Union, a moment when EU citizens shape the future of the Union, even though they have expressed their wish not to be part of this future? Does it make sense for MEPs elected as part of the British contingent to participate in the election of the President of the Commission and the confirmation of the rest of the college, despite the fact that the United Kingdom is supposed to leave before the next Commission takes office? However, from a strictly legal point of view, as it has been said elsewhere, the British participating in the European elections [is not a major headache](#), since it has been anticipated by the [European Council Decision \(EU\) 2018/937 of 28 June 2018 establishing the composition of the European Parliament](#).

The Devil, however, lies in the details. In France, for example, the deadline for EU citizens to register to vote for the European elections was the 31<sup>st</sup> March, at a time when British citizens could legitimately expect that they would not get to participate in these elections. Of course, some of them can still vote by proxy in the United Kingdom, but not all of them, notably because of the [15-year rule](#), which is [applicable to European elections](#). A similar problem [apparently occurred in Germany](#).

A British citizen residing in France challenged the French legislation before the Council of State, because it does not provide for a derogation to the registration deadline when Article 50 has been triggered. The Council of State [rejected the application on the 15<sup>th</sup> May](#), without referring the matter to the Court of Justice for a preliminary ruling.

First, the Council of State considered that, since the same deadline applied to both French citizens and citizens of Member States other than France, there was no infringement of Articles 22(2) of the Treaty on the Functioning of the European Union and 39(1) of the Charter of Fundamental Rights of the European Union, which both require that every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State.

Secondly, the Council of State considered that despite the uncertainty as to whether they could exercise their right to vote in May 2019, British nationals residing in France had retained the legal right to register on the complementary electoral lists. Moreover, they could not exclude the possibility of either [another](#) extension of the two-year period or even a unilateral revocation by the United Kingdom of the notification of its intention to withdraw from the European Union, a right granted to it by the Court of Justice of the European Union in [its Wightman judgment](#). It was therefore their responsibility, the Council of State continues, to register on the complementary electoral rolls within the deadlines set by the electoral code.

This ruling demonstrates both a very poor understanding of the principle of equality in EU Law and a questionable conception of the citizens' duty of anticipation.

Regarding the principle of equality, the Council of State has interpreted it in a very French way. According to French case-law, and especially the [1997 case Société Baxter of the Council of State](#), the principle of equality requires public authorities to treat similar situations equally, but only allows (and does not require) them to treat different situations differently. Since the deadline was the same for French citizens and EU citizens, they were all treated equally. Nothing to see here. However, since the issue is the European elections, it is clearly within the scope of EU Law. The principle of equality should therefore be applied having due regard to the case-law of the Court of Justice.

According to this case-law, the principle of equality not only requires similar situation to be treated similarly, *but also different situations to be treated differently*. In a 1963 case [Italy v Commission](#), the Court ruled that "discrimination in substance would consist in treating either similar situations differently *or different situations identically*". Since then, the Court has sometimes applied this precedent boldly. For example in [the 2003 famous case Garcia Avello](#), children with dual Belgian and Spanish nationality residing in Belgium were registered in Belgium under the sole name of their father ("Garcia Avello"), as is customary in Belgium, and under the double name of their father and mother ("Garcia Weber") to the consular section of the Spanish Embassy in Belgium, as is customary in Spain. The Court considered the refusal of the Belgian authorities to register children under the same name as in Spain as discriminatory, *precisely* because they had been treated *like* other Belgian citizens, whereas their dual nationality placed them in a *different* situation. This different situation therefore required a different treatment which should have consisted in derogating to the rule according to which only the name of the father is taken into account by the Belgian authorities, in order to avoid the inconveniences of the duality of surname – an inconvenience that Belgian citizens who do not have

another nationality do not suffer. Note that the Court adopted such a solution in a case about surnames – an issue that does not even fall within the competences of the European Union. It is fair to say that, in our case, British citizens residing in France were also in a situation objectively different from the other EU citizens residing in France (French or not), which should have warranted a derogation to the common rule.

Furthermore, the requirement of the Council of State regarding the British citizens' duty of anticipation is unreasonable. It is important to remember, first, that the right to vote and to run as a candidate for European elections is a fundamental right of the EU citizens, as the Court ruled in [its 2015 case \*Delvigne\*](#). To quote [the European Court of Human Rights in its famous \*Airey\* case](#), fundamental rights are not meant to be "theoretical or illusory but (...) practical and effective". Furthermore, any limitation to this right has to be justified and proportionate. Arguably, setting a deadline for registration to vote long enough before the elections can be such justified by the necessity of an orderly organisation. However, according to Article L30 of the French Electoral Code, exceptions exist that allow registration at a later date, especially for voters who could not register in due time. This is the case for example for French nationals who have reached voting age, acquired French nationality or have recovered the exercise of the right to vote after the registration period has closed. It is not a major stretch to include those who, in all good faith, legitimately expected not to be able to vote when the registration period closed. Furthermore, the existence of this derogation shows that it is not a major inconvenience to make an exception in such cases because they probably concern a small number of people. It would therefore not constitute a major inconvenience to make another exception for the small population of British citizens residing in France and wishing to vote in France. One could then also argue that, considering the circumstances, the right of the British citizens to take part in the European elections would be deprived of any *effet utile* without an extension to the registration deadline.

The Council of State disagrees. According to the justices of the French Supreme Administrative Court, the British citizens residing in France should have known that Brexit could be delayed or cancelled, and should have acted accordingly, just in case the United Kingdom would still be a Member State of the European Union at the date of the European elections. Formally, it is true that UK citizens knew, or at least should have known, that Brexit could be delayed or cancelled. But is it reasonable to expect from private citizens such a degree of anticipation, when the French Government itself only took measures long after the 11<sup>th</sup> April? [The Government only brought the bill meant to adopt the necessary measures to cope with the consequences of the United Kingdom participating in the European elections on the 24<sup>th</sup> April, and it has still not been definitely passed as I write these lines.](#) Is it reasonable to expect more anticipation from UK citizens than from their own Administration? [In a Tweet](#), the British Electoral Commission tried to justify last Thursday's major hiccups by "the very short notice from the Government of the UK's participation in these elections". How come British citizens were supposed to be diligent and anticipate the situation when the British administration did not? Is it reasonable to consider that the British citizens should have predicted a move that baffled a lot of observers and journalists? Surely, they could have anticipated

it as a possibility and they could have registered “just in case”. But is Law made for unrealistic, unreasonably diligent individuals or for real-life Human beings? Does such a solution make the citizens’ right to vote “practical and effective” or “theoretical or illusory”?

The European elections are an important moment in the democratic life of the European Union. In these times of never-ending Brexit, it could be a perfect occasion to remind citizens that the European Union is, first and foremost, about them. The latest news suggest that the British administration failed to live up to this expectation, and [legal challenges may come soon](#). I wish them better luck than the British Citizens in France, and hope that British courts, unlike the French Council of State, will not choose to defend a formal and abstract conception of Law, not the one that is made for people, but a Kafkian one that eludes citizens at every turn and blames them when it fails to protect their rights.

